In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1873

RICHARD E. HAWK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner, an attorney, was convicted of having willfully failed to file federal income tax returns for the years 1968 and 1969, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. Petitioner was sentenced to one year's imprisonment, six months of which were suspended, to be followed by three years' probation; he was also fined $3,000. The court of appeals affirmed (Pet. App. I).

Petitioner contends that the trial court improperly instructed the jury on the issue of willfulness. The trial court instructed the jury on that issue as follows (Pet. App. I, p. 2, n. 2):

> Now, we come to specific intent and willfulness. The specific intent of willfulness is an essential element of

> the crime of failing to make an income tax return. The term "willfully" used in the statute * * * means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent, or negligent. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under this criminal law.
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> * * * The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what the law requires to be done; that is to say, with the bad purpose to disobey or disregard the law that requires him to disclose to the Government facts * * * material to the determination of his income tax liability. * * *
>
> There is no necessity that the Government prove that the defendant had the intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of law. * * *

Petitioner contends that, under this Court's decision in *United States* v. *Bishop*, 412 U.S. 346, the jury should have been expressly instructed that it could convict only upon a finding that his failure to file had proceeded from an "evil motive." The court of appeals properly rejected this contention in an opinion (Pet. App. I, pp. 4-5; emphasis in original) on which we primarily rely:

> Still, a nagging question remains as to Justice Blackmun's reference to "evil motive"; was it the unstated intent of the opinion to require inclusion of those exact words? We think not. The statement in the opinion is that willfulness is to be uniformly defined to require the bad purpose or evil motive *de-*

scribed in *Murdock* v. *United States,* 290 U.S. 389 (1933). In *Murdock* the defendant had declined to answer certain questions relating to his tax liability on Fifth Amendment grounds. He was prosecuted for "willfully" failing to supply information to revenue officials. During the course of the prosecution it was determined that he had not been justified in asserting his Fifth Amendment privilege. Murdock defended arguing that his refusal was not willful. The Supreme Court held he was entitled to an instruction that if his refusal was in good faith—that is, with an honest belief in the protection of the Fifth Amendment—it could not be willful. The thrust of the opinion is that willfulness requires proof that the act was done with knowledge it was wrongful. The Court discussed a number of ways of expressing this type of specific intent, and among the terms mentioned were "bad purpose" and "evil motive." *Id.* at 394. See also *Spies* v. *United States,* 317 U.S. 492 (1943).

However, neither bad purpose nor evil motive is an independent element of a willful failure to file under §7203. The term "evil motive" is merely a "convenient shorthand expression to distinguish liability based on conscious wrongdoing from liability based on mere carelessness or mistake." *Boardman* v. *United States,* 419 F. 2d 110, 114 (1st Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). Thus the term expresses, in a brief way, the more cumbersomely stated concept of specific intent in *Murdock,* a concept the instructions must ultimately convey. See *United States* v. *Platt,* 435 F. 2d 789, 793-95 (2d Cir. 1970); *United States* v. *Matosky,* 421 F. 2d 410, 412 (7th Cir.), *cert. denied,* 398 U.S. 904 (1970) ("the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the

> defendant knew ought to be filed."); *Hayes* v. *United States,* 407 F. 2d 189, 195 (5th Cir.), *petition for cert. dismissed,* 395 U.S. 972 (1969); *cf. United States* v. *Smith,* 487 F. 2d 329 (9th Cir. 1973); *Haskell* v. *United States,* 241 F. 2d 790, 794 (10th Cir.), *cert. denied,* 354 U.S. 921 (1957). This, we think was all that *Murdock*—and *Bishop*—meant by the use of that term.

We further add that the trial court's instruction conformed with this Court's determination in *Bishop* that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The crucial distinction drawn by this Court in *Bishop* was between deliberate, conscious intent, on the one hand, and inadvertence or negligence, on the other; the trial court's instructions properly made that distinction.

Petitioner points out that the decision below conflicts with *United States* v. *McCorkle*, C.A. 7, No. 73-1084, decided April 8, 1974. But the Seventh Circuit granted the government's petition for rehearing *en banc* in *McCorkle* on July 12, 1974, so that the conflict alleged by petitioner may be resolved by the full bench of the Seventh Circuit without any need for further review by this Court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[1]Petitioner also suggests that the decision below conflicts with *United States* v. *Tunnell,* 481 F. 2d 149 (C.A. 5). There is no conflict. The court in *Tunnell* merely observed that the evidence amply supported a finding of "evil motive"; no question was raised there concerning the propriety of the jury instructions on willfulness.